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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

PORTER, et al. Plaintiff, v. BOARD OF TRUSTEES OF MANHATTAN BEACH UNIFIED SCHOOL DISTRICT, et al. Defendant.	Case No. CV 00-8402 GAF (RNBx) **MEMORANDUM AND ORDER REGARDING PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT OR, IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION OF MATERIAL FACTS AND ISSUES PURSUANT TO FED. R. CIV. P. 56(d), ON PLAINTIFFS' FIRST, SECOND, THIRD, AND FOURTH CLAIMS FOR RELIEF AND THE LOCAL DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT**

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BY DEPUTY

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

I.

INTRODUCTION AND SUMMARY

This case presents the Court with a dispute between Dashiell Porter ("Dashiell"), a learning disabled student, and his parents (jointly "Plaintiffs" or "the Porters"), on the one hand, and Dashiell's school district ("the District" or "Local Plaintiffs")[1] and the California Department of Education ("CDE")[2], on the other.[3]

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[1] Local Defendants consist of both the Manhattan Beach Unified School District ("MBUSD") and (continued...)

Dashiell, born in 1987, was found eligible for special education when he was three years old, and diagnosed with autism at age nine. Plaintiffs contend that the District has failed to provide Dashiell with a free and appropriate public education ("FAPE") as mandated by the Individuals with Disabilities Education Act ("IDEA"),[4] and that the CDE has denied Dashiell his IDEA rights by failing to take appropriate measures, once it had found that the District had denied Dashiell his educational rights, to ensure that the District complied with the its order for corrective action. Plaintiffs now move for summary judgment on those claims.

The undisputed evidence before the Court establishes that, over a period of many years, the Porters futilely sought to enforce Dashiell's right to a FAPE in state administrative proceedings. The very first of those proceedings, a due process

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[1](...continued)
its Board Board of Trustees. Plaintiffs also sued Gerald F. Davis, Superintendent of MBSUD, and Linda M. Jones, Director of Pupil Personnel Services for the district (together "Individual Defendants").

[2] In addition to the CDE, Plaintiffs sued the state Board of Education and Delaine Eastin (together "State Defendants").

[3] This action was initially brought before District Court Judge Ronald S. Lew. Judge Lew dismissed the action on the grounds that the Porters failed to exhaust their administrative remedies and that the claims asserted against state officials were barred by the Eleventh Amendment. The Porters appealed Judge Lew's ruling. While their appeal was pending, the Porters further exhausted their administrative remedies before the California Department of Education. In 2002, Ninth Circuit reversed the dismissal and the case was remanded with all of the Porters' claims intact. After the action was remanded, it was transferred to this Court.

[4] Although the caption of the complaint lists only four causes of action, internally the complaint sets forth sixteen headings that are referred to by Plaintiffs as "claims for relief." The Court concludes that these sixteen "claims for relief" are more properly refer to as causes of action. Using Plaintiffs' terminology, Plaintiffs' complaint is structured as follows. Plaintiffs' first cause of action encompasses Plaintiffs' first four claims for relief, which are the subject of the instant motions. Plaintiffs' second cause of action, which consists of the fifth through eighth claims for relief, seeks compensatory and punitive damages and injunctive relief for deprivation of civil rights under 42 U.S.C. § 1983 based on Defendants violations of the IDEA and Dashiell's equal protection and due process rights guaranteed by the United States Constitution. Plaintiffs' third cause of action encompasses the ninth through fourteenth claims for relief, which seek compensatory damages for discrimination based on disability in violation of Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794. Finally, Plaintiffs' fourth cause of action contains the fifteenth through sixteenth claims for relief and seeks compensatory and punitive damages for Defendants' illegal conduct against Dashiell done in retaliation for Mrs. Porters exercise of her First Amendment right to free speech in violation of 42 U.S.C. § 1983.

hearing before a Special Education Hearing Officer ("SEHO"), was conducted in 1999. After five days of hearings, the SEHO concluded that the District, in a number of specific areas, had failed to provide Dashiell with a FAPE in the summer of 1997 and the 1997-98 school year, and had failed to maintain adequate records of the parents' position regarding Dashiell's educational needs. The hearing officer issued an order that required the District to provide Dashiell with compensatory education to remedy the past denials of his right to a FAPE. The hearing officer also provided the District with general directions regarding the content of future Individual Education Plans ("IEPs") developed for Dashiell. The District has never fully complied with any aspect of this order.

Over the next several years, the Porters sought, through meetings with District representatives and proceedings before the California Department of Education, to enforce Dashiell's educational rights, but with very little success. The CDE, for example, originally concluded that the District had failed to comply with the SEHO order in numerous respects, and issued its own order requiring the District to undertake specific steps to cure these deficits. However, instead of requiring the District to provide evidence of the actual implementation of the CDE's requirements, the CDE accepted assurances from the District as to what it intended to do as compliance with its order. When the District failed to perform on its promises, the CDE was forced to consider additional complaints filed by the Porters and by one of its own consultants regarding the District's failure to provide Dashiell with a FAPE. The CDE again concluded that the District had failed to meet its obligations to Dashiell and issued another compliance order. However, as of the preparation of this memorandum and order, the District has still not done what it has been repeatedly ordered to do – compensate Dashiell for the District's past failure to provide him with an adequate education, and to develop an IEP to meet his present and future educational needs.

Despite this dismal record, Local Defendants cross move for summary judgment essentially on the grounds that: (1) Plaintiffs, through a variety of actions including the alleged refusal to accept various IEPs and to discuss Dashiell's educational needs at IEP meetings, have caused the District to fail to implement the SEHO order, the CDE orders and an appropriate IEP; and (2) the issue is moot because the 2004 order from the CDE resolves all of the issues presented in the pending lawsuit.[5] In short, the District acknowledges that Dashiell has been denied his FAPE over the past seven years, but asserts that, on the undisputed facts, it should be excused from those failures because of the conduct of Dashiell's parents.

The Court concludes that there are no triable issues of material fact which preclude judgment for the Plaintiffs' as to all claims addressed by the instant motions. Further, the Local Defendants' cross motion and both defendants' positions in opposition to Plaintiffs' motions are wholly without merit. Accordingly, Plaintiffs' are entitled to judgment as a matter of law and to all relief for which they have prayed in the causes of action now of summary judgment. Plaintiffs' motions for summary judgment against the State and Local Defendants are therefore **GRANTED** and the Local Defendants' cross motion is **DENIED**.

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[5] The Local Defendants' cross motion for summary judgment claims to be seeking summary judgment on Plaintiffs' first two causes of action. It is apparent, however, that the Local Defendants are seeking summary judgment on their affirmative defense asserted in their answer to Plaintiffs' Second Amended Complaint("SAC"). The Local Defendants do not inform the Court as to which affirmative defenses they seek summary judgment. The Court concludes that there are four affirmative defenses that potentially address the Local Defendants' arguments. They are pleaded in the Local Defendants' answer to the SAC as: (1) unclean hands, (2) "alternative causation," (3) estoppel, and (4) waiver. The affirmative defense fashioned as "alternative causation" states: "Prior to and at the time of the acts alleged in the second amended compliant, plaintiffs' acts were the legal or proximate cause of the injuries and damages sustained, if any, thereby barring plaintiff from recovery in this action." (LD Ans. at 16). The Court concludes that this defense best describes the Local Defendants' cross motion.

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II.

UNDISPUTED MATERIAL FACTS [6]

Born in 1987, Dashiell has been diagnosed with a variety of disabilities that make him eligible for special education and services under the IDEA, including autism. (PSUF ¶ 1).[7] He was first diagnosed at age three with speech and language deficiencies. By 1991, he had begun receiving speech and language therapy and had been put in a special day class. During his fourth grade year (1997-1998), Dashiell continued to receive speech and language therapy, but was placed in a general education classroom where he participated in the regular curriculum offered to all students. However, in his fifth grade year, testing revealed that he had various academic and socialization deficiencies. Since that diagnosis, Dashiell and his parents have been at odds with the district over the educational services being offered to him.

A. The State Education Hearing Office Actions

1. The SEHO Proceedings

On January 4, 1999, through the State Education Hearing Office ("SEHO"), Dashiell's parents initiated due process proceedings in which they claimed that the District had denied Dashiell a fair and appropriate public education ("FAPE") to which he was entitled under state and federal law. (PSUF ¶ 9). On June 30, 1999, after five days of hearings, the SEHO issued a written decision, (id. ¶¶ 10-11), finding that Dashiell had been denied a FAPE in the Summer of 1997 when the district failed to provide summer school instruction in the least restrictive environment, which may have negatively impacted his social development. (Pl. Exh. 4 at 00015); see also 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.550(b); Cal. Ed. Code § 56031. The SEHO also determined that thereafter, from September 1997 through October 1998, the District had continued to deny Dashiell a FAPE by failing to address Dashiell's socialization needs and by providing a program that was not reasonably calculated to provide him with educational benefit. On the latter point, the SEHO decision found that, under the program offered by the district, Dashiell failed to make any meaningful progress in reading comprehension, listening comprehension, or oral expression. (Pl. Exh. 4 at at 00007-14).[8]

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[6] In opposition to Plaintiffs' motion, Local Defendants argue that there are disputed facts with regard to various issues that preclude a judgment for Plaintiffs. As discussed more fully *infra*, the Court does not agree that there is any reasonable ground for dispute or for the interpretation which Local Defendants seek to impose on various facts. The Court further concludes that even if there was any reasonable ground for dispute, most of these facts are immaterial to the case as a matter of law. In sum, all the facts set forth in this section are either undisputed or without substantial controversy.

[7] "PSUF" stands for Plaintiffs' Statement of Undisputed Facts. The absence of any reference to the record indicates matters alleged in the complaint and/or discussed in the papers as to which there has been no objection or opposition. To the extent that the Local Defendants claim to dispute matters cited to the PSUF or otherwise set forth herein, the references to their statement of genuine issues or undisputed facts have been omitted because, as is more fully set forth below, the references made by the Local Defendants to sources purportedly reflecting facts to the contrary, when investigated, proved to be incorrect, with no facts, even viewing all facts and drawing all inferences from them most favorably to Local Defendants, demonstrating any genuine issue of fact.

The SEHO findings also discussed a long letter written to the District in November 1998 by the Porters titled "What Dashiell Needs."[9] The Porters had requested that the document be attached in its entirety to Dashiell's most recent IEP, but the District refused the request even though the document was "reviewed and discussed ***to some extent***." (Id. at 00015) (emphasis added). The SEHO determined that the failure to attach the document was not a procedural violation, but did find that the District erred in failing to keep the document in Dashiell's special education file as a record of the parent's position. (Id. at 00015, n.7). Likewise, the SEHO concluded that Dashiell had been denied a FAPE in the past (id. at 00020); the District was not required to offer after-school tutoring so long as the District could provide services during the day; and that removal from the classroom would not adversely affect Dashiell's socialization. (Id.)

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[8] The SEHO concluded that the program was otherwise sufficient to provide educational benefit, but in light of the entire record in this case, although not material to the Court's decision, the Court disagrees with that determination because it was based, in part, on the SEHO's conclusion that Dashiell's "inclusion specialist" was sufficient qualified, (Exh. 4 to PMSJ at 00009-10), whereas, in fact, he had only a bachelors of arts degree based on a major in physical education and a minor in drama, had no teaching certification, much less special education certification, and was just a substitute teacher with no experience in special education or inclusion instruction at all. (Id.). His only instruction was from another equally untrained individual, whose support then led to the selection of this unqualified "inclusion specialist." (Id.). Not only was this not "reasonably calculated" to provide Dashiell with educational benefit, but it may well be, in and of itself, a denial of a FAPE. If the District is not up to the task because it lacks qualified help, parents must be supplied with funds to assist the challenged students or the District must contract outside the system for properly equipped personnel rather than provide this type of "assistance."

[9] The SEHO order cites this letter as dated November 1999, but the Court concludes this date must be a typographical error given that the SEHO order is dated June 30, 1999, more than two months before November of 1999.

2. The SEHO's Orders

Along with the findings discussed above, the SEHO issued a number of rulings and orders. First, the SEHO denied the Porter's request for reimbursement for private tutoring they had arranged for Dashiell for the Summer of 1997.[10] (Id. at 00019). Second, the SEHO ordered equitable relief in the form of ***compensatory education*** to be provided throughout the 1999-2000 school year, for violations occurring from summer 1997 to September 1998, though it left the precise form of compensation to the IEP team members, which included the Porters. (Id. at 00019-20).

The SEHO did, however, specifically order that the IEP include social skills instruction and/or modeling and remedial instruction in areas of academic deficit. (Id.). The SEHO also specifically noted that although the denial of a FAPE did not automatically obligate the District to provide Dashiell with day to day or session for session replacement of missed opportunities, (id. (citing to Parents of Student W v. Puyallup Sch. Dist., 31 F.3d 1489 (9th Cir. 1994))), the IEP team must determine whether it would be more effective to provide the compensatory services during the school day or during after school hours. (Id.).[11]

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[10] Although the SEHO found that violations of a FAPE occurred in the summer of 1997, these related to Dashiell's socialization needs not his academic needs which were not found to be lacking in denial of FAPE until the start of the school year that fall.

B. The IEP Team Meetings Following The SEHO Order

1. The September 13, 1999 IEP Meeting

The parties agreed to meet on September 13, 1999 at the start of Dashiell's sixth grade school year to develop an IEP.[12] (Pl. Exh. 7 at 00067; Exh. 5 at 00030 ¶ 5, 00035). At the meeting, the Porters presented a comprehensive written plan to provide Dashiell with the compensatory services ordered by the SEHO, proposing in-school support related to reading comprehension, listening comprehension, oral expression and social skills, which included monitoring, training, and mentoring components. (PSUF ¶ 16). The District countered by offering to provide Dashiell with approximately five to six-weeks of remedial instruction including forty-four minutes of twice weekly after-school instruction in reading and listening comprehension and oral expression, and one hour a week of designated instruction and services ("DIS") counseling under Cal. Educ. Code § 56363 and 5 C.C.R. § 3051.9, to address Dashiell's social skills deficits. (Id. ¶ 17(a)-(b)).

In a September 20,1999 writing, the Porters responded to the District's offered plan. (SUF ¶ 19; Pl. Exh. 8) While they did not agree that it constituted a complete compensatory services plan, they nevertheless consented to having the District implement both the after school tutoring (so long as the District provided an "appropriately qualified and trained teacher"), and the DIS counseling. (SUF ¶ 19; Pl.

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[11] The SEHO made special mention that even though it determined that after-school assistance was not required as a provision of FAPE, that determination did not necessarily apply to compensatory education. (Id.).

[12] In keeping with the SEHO order, the District offered to convene an IEP meeting on July 30, 1999, but because it could not ensure the attendance of all the required IEP team members by the deadline, the Porters agreed to convene the meeting on September 13, 1999.

Exh. 8). On September 28, 1999, the District acknowledged the Porter's approval and suggested execution of the IEP at the earliest opportunity. (Pl. Exh. 185.3).[13]

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2. The October 1999 IEP Meeting

At the IEP meeting held on October 11, 1999, the District re-set the start date for the DIS counseling from September to October and offered to have the counseling extended for a full year until October 2000. (PSUF ¶ 21). Although the Porters did not request either of these changes in dates, they agreed to them and again consented to the proposed DIS counseling.[14] (Id. ¶ 22). At this meeting, the Porters submitted a written proposal for a further educational program for Dashiell's sixth grade year as well as another proposed compensatory education plan related to remedying his academic deficits by providing Dashiell with four periods daily of instructional services to be provided by a certified non-public agency. (PSUF ¶ 23; Wyner Decl. ¶ 6). The District was unwilling to discuss the Porters' proposal at the meeting. (PSUF ¶ 24).[15] When the Porters heard nothing further on the subject, they wrote to the District on November 8, 1999 and asked the District to respond to their proposal. (Id. ¶ 25). The District did not reply to either the letter or to the proposal itself. (Id. ¶ 28).[16]

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[13] Local Defendants argue that the Porters did not consent to the entire IEP offered and because the Porters' conditioned their consent, their letter was not consent at all. The Court, however, finds that the Porters did consent to the services discussed above and that the District clearly understood that they had done so as reflected by the District's reply letter, promising to prepare for implementation as soon as possible. Indeed, the fact that the Porters conditioned after-school tutoring on the District providing a qualified and trained educator can hardly be construed as withholding consent given that there is no evidence that the District's offer was contingent on their right to provide Dashiell with an unqualified and untrained tutor. Thus, the Porters terms did not materially differ from the Districts. That being the case, the Court finds that the District was required, at the very least, to comply with these proffered and agreed upon steps.

[14] The District asserts that the delay was due to the Porter's failure to agree to and sign the IEP. (LD SGI ¶ 21). The District presents no authority for the proposition that the IEP itself must be signed before the District is able to implement it. Mrs. Porter's letter agreeing to the two offers was signed. Accordingly, the contention that the Porter's somehow delayed implementation by failing to "sign" the IEP is meritless.

[15] The District contends that it "chose to develop goals and objectives first in order to determine proper placement" and concluded the meeting due to time constraints, not because of a refusal to discuss the proposal. (LD SGI ¶ 24). Regardless of the circumstances, it is clear that the District was unwilling to engage in any consideration of the proposal that day.

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3. The District's Failure to Implement the IEP

In the meantime, on October 22, 1999, the District began providing Dashiell with DIS counseling, but not weekly as promised. Dashiell was provided with only three counseling sessions over the next two months and no tutoring. (Id. ¶ 26). Accordingly, on December 2, 1999, the Porters wrote to the District again, reiterating that they had accepted the District's September 1999 after-school tutoring offer and requesting an explanation as to why it had not begun and why they had yet to receive a response to their proposal submitted at the October IEP meeting. (PSUF ¶ 27(á)-(b)). For two months, the District failed to respond. Finally, on February 7, 2000, the District informed the Porters that they obtained a teacher with a special education credential to provide the promised after-school tutoring. (Id. ¶ 29). The District promised to stay in touch, but nothing more was communicated to the Porters and Dashiell never received any after-school tutoring during his sixth grade school year (1999-2000). (Id.).

Dashiell was also denied many of the agreed-to weekly counseling sessions during that year, receiving only twenty-four in total.[17] . (Id. ¶¶ 33, 34). Furthermore, during the sixth grade school year, the District did not determine the nature or extent of the compensatory services due to Dashiell as mandated by the 1999 SEHO Order. (Id. ¶ 36).[18]

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[16] The District's failure to notify the Porters in writing of its refusal to implement the proposal violated 34 C.F.R. § 300.503 (a)(1)(ii), (b).

[17] Most of the District's excuses for the failure to provide the weekly counseling sessions involve counselor illness, school holidays, and student illness. (LD SGI ¶ 26). Regardless of the reasons, no effort was made to make-up the missed sessions.

[18] The District's excuse for this failure – that no agreement had been reached as to the "goals and objectives" for Dashiell's sixth grade year – has no bearing on why the District did not determine the nature or extent of the services to which Dashiell was entitled or why the District failed to provide compensatory education in the form of a sufficient number of DIS counseling (continued...)

C. Plaintiffs' Efforts to Obtain Compliance with the SEHO Order

1. The March 3, 2000 Notice and Demand

On March 3, 2000, the Porters' counsel sent a letter to District counsel with copies sent to District personnel, counsel for the CDE, and the CDE's Director of Special Education Division, putting all on notice that the District had failed to provide Dashiell with the compensatory education ordered by the SEHO. (Id. ¶ 30). On April 7, 2000, counsel for the District replied, indicating that the District advertised for a credentialed education teacher following the September 1999 IEP meeting, thereby reflecting their understanding that the Porters had consented to go forward with the after school tutoring, and further admitting that the District had not provided the compensatory education program ordered by the SEHO. (Id. ¶ 31(b)).

2. The May 24 and June 13, 2000 Notices

On May 24, 2000, the Porters informed the District that although Dashiell also continued to be a public school student, the Porters had placed him in Lindamood Bell, a private reading comprehension and oral expression program in an attempt to get him the services he needed. (P. Exhs. 5, 6). On June 13, 2000, Mrs. Porter informed the District's Board of Trustees that the compensatory education ordered in the June 1999 SEHO order had not been provided and that District staff had not responded to her correspondence. (PSUF ¶ 32).

D. Post Filing Administrative Events

On August 7, 2000, the Porters filed this lawsuit. The case was initially assigned to the Honorable Ronald S. Lew, District Court Judge for the Central District of California. On December 13, 2000, Judge Lew dismissed the case, in large part, on the ground that the Porters failed to exhaust their administrative remedies. This ruling was appealed to the Ninth Circuit and eventually reversed. In the meantime, on December 26, 2000, the Porters utilized California's complaint resolution procedure

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[18](...continued)
sessions and after-school tutoring. (LD SGI ¶ 31, 36).

by requesting that the CDE conduct a state investigation of the District with respect to all allegations of violations of the IDEA and California law set forth in the Porters' pleadings in this action. (Id. ¶¶ 39, 208).

On January 4, 2001, the CDE opened a compliance investigation. (PSUF ¶ 40). While the CDE was preparing its position on the matter, the Porters continued to meet with the District regarding Dashiell's educational needs. At an IEP meeting held on February 5, 2001, the Porters asked for the District's position on compensatory education for Dashiell's remedial reading needs, but the District on the advice of counsel, would not even discuss Dashiell's compensatory educational needs. (Id. ¶ 41).

Thereafter, on February 22, 2001, the Porters inquired of the CDE how it proposed to ensure that the District would comply in the event that the Porters prevailed in the CDE hearing. (Id. ¶ 213). No response was received to this inquiry, other than as is contained in the CDE order and ruling. (Id. ¶ 214). On March 23, 2001, after completing its investigation, the CDE issued its compliance report ("the Report"). (PSUF ¶ 42).

1. Findings in the Report

The CDE Report concluded that the District failed to comply with the SEHO order in several ways: 1) it did not provide the required "remedial instruction in areas of academic deficit;" 2) it failed to create or implement a compensatory services plan; 3) it did not provide the weekly counseling services as required by the terms of Dashiell's October 11, 1999 IEP; and 4) it did not implement Dashiell's December 1997 IEP, as modified by the SEHO order. (Id. ¶¶ 43(a)-(d); 218 (a)-(b)).

The Report also found that the District had failed to develop and actually implement an updated IEP for Dashiell since December 1997. (Id. ¶¶ 44 (a)-(f); 219 (a)-(f)). It further found that the District had committed a number of procedural violations, including failing to ensure that a general education teacher attended the September 13, 1999 IEP meeting (in violation of 34 C.F.R. § 300.344(a)(2)), and failing to ensure that Dashiell's IEPs between December 1997 and March 2001 contained current academic goals and a statement of how progress on these goals was to be reported to the Porters (in violation of 34 C.F.R. §300.347(a)(7)(ii)). (Id.). Finally, the Report found that the District had failed to provide the Porter's with required trimester reports of Dashiell's progress in various areas of deficit. (Id.).

2. The Report's Orders

To correct the District's violations of state and federal law, the Department of Education ordered the District to take the following corrective actions and to provide the following relief:

(1) Implement Dashiell's IEP within 15-days of issuance of the Report, "in its entirety, including, but not limited to: weekly [social skills] counseling sessions, after school tutoring by a qualified special education teacher . . . [and] instruction in social skills curriculum," and provide written assurance to the Department of Education that it had done so as proof of its compliance with this corrective action. (Id. ¶¶ 45(a), 220(a)).

(2) Convene an IEP team meeting within 45-days of the issuance of the Report to develop a current IEP addressing Dashiell's complete educational program, including, but not limited to: goals and objectives in all areas of academic deficit pursuant to the 1999 SEHO order. In order to comply with this corrective action, the District was required to provide "a copy of the resulting IEP." (Id. ¶¶ 45(b), 22(b)).

(3) Address Dashiell's potential need for additional compensatory education beyond that ordered by the 1999 SEHO order to make up for the District's failure to develop and implement an updated IEP since December 1997. The new IEP was to include a "plan for compensatory services," if the IEP team determined that Dashiell needed additional compensatory instructional services above and beyond that which was due under the 1999 SEHO order. In order to comply with this corrective action, the District was required to provide "a copy of the resulting IEP, including the plan for compensatory services, if any." (Id. ¶¶ 45(c), 220(c)).

(4) Reimburse the Porters for the outside services provided by Lindamood Bell private tutoring in the amount of $25,828.80. (Pl. Exhs. 5, 6).

3. The Report's Enforcement Provisions

However, despite the findings of egregious violations, the CDE failed to provide an adequate enforcement mechanism to ensure compliance with its orders.[19] Rather than monitoring the District itself, the CDE ordered the District to create a monitoring system in the form of the "Systematic Relief" stated below.

(1) Develop and implement a monitoring plan to comply with 34 C.F.R. § 300.342, which requires that an IEP be in effect before services are provided and as soon as possible following meetings described in 34 C.F.R. § 300.343. Specifically, the CDE required the District to provide evidence that it sent a directive to all District employees who provide special education that outlines the provisions of 34 C.F.R. § 300.342(b) and emphasizes the requirement to provide all services in a timely manner. In order to comply with this Corrective Action, the District was required to provide a written description of its plan and at least one monitoring report.

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[19] The evidence shows that the CDE had notice that its plan lacked enforcement power. Two days before the Report and its orders were issued, CDE's counsel inquired of the CDE why it was merely asking for "assurances about the IEP implementation, rather than evidence of actual implementation. Maybe they need more than 15 days, but don't we want action instead of promises to act?" (PSUF ¶ 215). Despite this inquiry, CDE's order did not require the District to provide evidence of actual implementation of the 1999 SEHO order or the CDE's ordered corrective actions. (Id. ¶ 230). Instead, it only required the District to provide the CDE with copies of the IEPs. (Id.).

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(2) Develop and implement a system to monitor and comply with 34 C.F.R. § 300.347, related to the required content of an IEP. In order to comply with this Corrective Action, the District was required to provide a description of its monitoring system and at least one monitoring report.

(3) Develop and implement a system to monitor and comply with 34 C.F.R. § 300.343, which sets forth the requirements for initiating, reviewing and revising IEPs. In order to comply with this Corrective Action, the District was again only required to provide a description of its monitoring system and at least on monitoring report.

(Id. ¶ 221(a)-(c); Pl. Exh. 5 at 0060-63).[20]

E. The District's Failure to Comply with the CDE Orders

1. May 2001- July 2001 (The Remainder of Seventh Grade)

The District did not provide the after-school tutoring within the 15-day timeline established. In fact, an offer was not even extended to a special education teacher to provide the after-school tutoring until the May 3, 2001 IEP meeting, almost a month after the CDE ordered deadline. (PSUF ¶ 46). In addition, the District failed to determine the amount of additional compensatory education due to Dashiell and thereby also failed to develop a compensatory education services plan. (Id. ¶ 55(a)-(b)).

2. The 2001-2002 School Year (Eighth Grade and the Summer Prior)

(a) The District's IEP Meetings

(i) May 3, 2001 IEP Meeting

On May 3, 2001, the IEP team agreed that during Dashiell's eighth grade school year, he would receive the following compensatory education: (1) three, forty-

[20] Given the broad language of the CDE's ordered Systematic Relief, it arguably applied to not only Dashiell, but also to other special education students in the District and to District conduct generally.

four minute sessions of after-school remedial reading, weekly with Mr. Zablocki a credentialed special education teacher; and (2) one period of after-school, one-on-one counseling, weekly. (Id.).

(ii) May 15, 2001 IEP Meeting

When the IEP team reconvened on May 15, 2001, the District acknowledged that the 2001 Report required the IEP team to address Dashiell's potential need for additional compensatory instructional services to make up for the District's "failure to develop and implement an updated IEP between December 9, 1997 and the date hereof." (Id. ¶ 49). In order to facilitate the development of a compensatory services plan for Dashiell, the District agreed to pay for an assessment by Dr. Mel Levine's Student Success Center. (Id. ¶ 50). The team agreed that it would reconvene after the assessment was completed in order to design the compensatory services plan for Dashiell. (Id.). On May 16, 2001, the Porters gave their written consent to the implementation of the May 15, 2001 IEP ***without reservation***. (Id. ¶ 51).

(iii) July 3, 2001 IEP Meeting

Yet another IEP meeting was held on July 3, 2001. The IEP from that meeting provided that the District would continue to provide Dashiell with after-school reading instruction with Mr. Zablocki, which had begun on May 29, 2001, for three hours per week, and with after school, one-on-one counseling until August 2002. (Id. ¶ 56(a)-(b)). On September 4, 2001, the Porters consented to the July IEP, including, ***without reservation***, the District's offer of compensatory after school reading instruction and one-on-one counseling services. (Id. ¶ 56(c)).[21]

(iv) September 19, 2001 IEP Meeting

At the September 19, 2001 IEP meeting, the Porters provided the District with a copy of the Student Success Centers's written evaluation summary of its assessment of Dashiell. (Id. ¶ 58). At that meeting, the District documented that it would continue to provide Dashiell with after-school reading instruction for three hours per week, as well as the weekly after-school, one-on-one counseling through August 2002. (Id. ¶ 59). In the IEP the District also documented its position on the status of the compensatory education to which Dashiell was entitled under the 1999 SEHO order. It calculated that: (1) Dashiell was owed forty-two sessions of after-school compensatory counseling services because "no compensatory DIS counseling has yet been provided;" (2) Dashiell had not received six of the twenty hours of after-school compensatory services in reading that the District calculated should have been delivered during the June and July 2001 summer session; and (3) that Dashiell was entitled to receive 132 sessions of after-school, compensatory reading instruction by August 3, 2002. (Id. ¶ 60(a-c)). The District also admitted that it had no "DIS counselor" to provide counseling services to Dashiell, but promised that counseling would be made up in the future. (Id.).

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[21] The Local Defendants dispute this fact by saying that Mrs. Porter signed the IEP for attendance only. (LD SGI ¶ 56). However, Local Defendants admit that after the District responded to Mrs. Porter's concerns, she agreed to the July 3, 2001 IEP. (Id.). Therefore, there is no dispute on this issue.

On September 28, 2001, the Porters wrote a letter informing the District that Mr. Zablocki, the teacher who provided Dashiell with after-school instruction during June and July 2001, told the Porters that he could not provide three hours of after-school reading instruction, and at best, he could only provide one hour a week. (Id. ¶ 61(b)). The Porter's also wrote of their concern that the services offered only related to the 1999 SEHO order, but did not address the additional compensatory education the CDE suggested might be necessary. (Id. ¶ 61(c)). Furthermore, they complained that the District had no counselor for Dashiell. The letter concluded by stating that:

> ***We will consent to the implementation of the September 19, 2001 IEP***, even though its is clear that so much of it cannot be implemented [due to the lack of a counselor], because it is the district's recommendation and the best the district has offered. However, we do so with a complete reservation of our rights, given the fact that the IEP may be invalid on its face because the district knows (or should

> know) that it can't deliver the services included in the IEP. Because of the foregoing, we plan to file a compliance complaint based on MBUSD's continuing failure to comply with the June 30, 1999 SEHO order, the March 26, 2001 CDE Compliance Report, and the IEP's that were drafted and which we signed pursuant to those orders.

(PSUF ¶ 61(a); Pl. Exh. 52 at 00144-45).

(v) The October 30, 2001 IEP Meeting

Another IEP meeting was held on October 30, 2001 in which Special Education Director Thompson ("Thompson") identified and admitted to two blocks of compensatory education that had not yet been provided, namely (1) the compensatory education pursuant to the 1999 SEHO order, *i.e.*, reading and language for which the District was still working to find a provider; and (2) the additional compensatory education needed in order to remedy the District's failure to develop and implement an updated IEP since 1997. (PSUF ¶ 62). At the meeting, the District did not agree to adopt any of the Student Success Center's recommendations for purposes of designing additional compensatory services; instead, the District said only that it would consider them. (Id. ¶ 62(c)). To that end, Thompson also requested that the Porters develop a proposal for the compensatory services for the District to consider. (Id. ¶ 62(d)).

(vi) December 2001 IEP Meeting

At yet another IEP meeting in December 2001, the District agreed that the DIS counseling services required by the 1999 SEHO, but not yet implemented, should be provided on campus, and Thompson agreed to contact a District psychologist with experience in social skills for children with autism to develop a suggested plan and to identify potential providers. (Id. ¶ 65).

(vii) May 20, 2002 IEP Meeting

On May 20, 2002, another IEP meeting was held in which the Porters distributed a document, identified in the header as "May 20, 2002 IEP Final Outline," referencing, among other things, outstanding issues to be addressed, including, but not limited to, "Compensatory – from June 30, 1999 decision – Compensatory Plan; from March 25, 2001 report – Compensatory Plan." (Id. ¶ 68).

(vii) The District's Failure to Implement any of the IEPs

During his eighth grade school year, and summer session, the District again failed to provide Dashiell with services required by the SEHO and the CDE orders. It provided no after-school socialization counseling whatsoever, and after the 2001 summer session, the District provided no after-school reading tutoring, both of which were required by the 1999 SEHO order as well as the May 2001, July 2001, and September 2001 IEP's to which the Porters had consented. (Id. ¶¶ 70, 72). Likewise, the District failed to determine the nature and extent of the compensatory services to which Dashiell was entitled under the SEHO order and therefore could not have developed a compensatory educational services plan, as required by the CDE's order. (Id. ¶¶ 73-75).

(b) The CDE's Erroneous Finding that the District was in Compliance and Its Failure to Act on New Complaints

(i) May 2001-August 2001 – The District's Submission of Evidence of its "Compliance"

Within days after the May 3, 2001 IEP meeting, the District submitted a package of documents to the CDE as evidence of its compliance with certain corrective actions, pertaining to the Systematic Relief. (Id. ¶ 224). Thereafter, the District also submitted the May 15, 2001 IEP as evidence of compliance. (Id. ¶¶ 52, 225). When later deposed, Thompson stated that when reviewing these submissions she had "no specific understanding" of the meaning of the term "compensatory services plan," but that she believed the District had submitted a satisfactory compensatory services plan to the CDE. (Id. ¶ 66(a)-(b)).

In fact, the submitted papers did not show that the District had implemented any of the corrective action orders. For example, the May 15, 2001 IEP does not address Dashiell's complete education program, including, goals and objectives and remedial instruction in areas of deficit as required by the SEHO and CDE orders. (Id. ¶ 227(a)). Indeed, because the May 15, 2001 IEP expressly provided that the team was to reconvene on September 19, 2001 to address these very issues, the District in effect had conceded that it had not implemented any program to deal with Dashiell's need for additional compensatory education services. (Id. ¶ 227(b)). Moreover, neither the May 11, 2001 nor the May 15, 2001 IEPs submitted as evidence included the required follow-up monitoring report. (Id. ¶ 228). In fact, the CDE employee responsible for determining if the District was in compliance testified in her deposition that she did not know whether the District ever submitted the follow-up monitoring reports to satisfy the ordered Systematic Relief. (Id. ¶ 229). Despite all this, on August 2, 2001, the CDE found that the District had completed all the required corrective actions, and closed the case and investigation. (Id. ¶¶ 57, 226).

(ii) The Porters's Subsequent Complaints

On November 2, 2001, the Porters wrote the CDE and requested a second state investigation regarding the fact that the District was not providing Dashiell with services, including compensatory education, either pursuant to the 1999 SEHO order or the 2001 CDE Report. (Id. ¶¶ 63, 235). Although this letter was the Porter's second complaint to the CDE regarding the District's conduct, the CDE did not open a new compliance investigation but instead, construed the letter as a request for reconsideration. (Id. ¶ 240).

On January 16, 2002, Mrs. Porter again provided written notice to the CDE that the District had not yet begun to address the issue of the additional compensatory services discussed in the 2001 CDE order. (Id. ¶ 236). In that same letter, Mrs. Porter reiterated the request that she made in the November letter, for a second state investigation. (Id. ¶ 238).

(iii) The Porters Obtain the Assistance of Matthew Hill

On January 29, 2002, Mrs. Porter discussed the substance of the January 16, 2002 letter with Matthew Hill, a consultant in the CDE's Focused Monitoring and Technical Assistance Unit. (Id. ¶¶ 240, 241; D. Porter Decl. ¶ 10).[22] According to Mrs. Porter, Mr. Hill told her, among other things, that he would look into the matters raised by her letter and would call her back. (Id. ¶ 240). He also informed her that rather than opening a new complaint, when the CDE received her November 2001 letter, they had dealt with it as a request for reconsideration. (Id.). On February 4, 2002, Mr. Hill told Mrs. Porter that he would walk her November 2001 letter to the lead person in the complaints investigation unit to activate a new complaint. (Id. ¶ 242). On March 5, 2002, Mr. Hill informed Mrs. Porter that he did as he had promised, but recommended she call the complaint unit to inquire whether she needed to file a new formal complaint. (Id. ¶ 243).

3. The 2002 - 2003 School Year (Ninth Grade)

Within days of the next scheduled IEP meeting, the Ninth Circuit reversed the dismissal of this lawsuit and remanded for further proceedings. In the meantime, the Porters continued their efforts to work with the CDE and the District to implement an IEP that would provide Dashiell with an education consistent with the mandates of state and federal law.

(a) October IEP Meeting and December Communications

On October 12, 2002, an IEP meeting was held in which the District and the Porters reached an agreement on twenty-eight goals and objectives that were to be implemented during the 2002-2003, ninth grade school year. (Id. ¶ 77). The Porters agreed to permit the District to "start addressing" the goals and objectives with final edits by the Porters to be provided by that Friday. (Pl. Exh. 75 at 00174). At the IEP meeting, Southwest SELPA[23] Director Farran stated that a certified staff member of the L.A. County Office of Education, Gail Honeycutt ("Honeycutt"), "may be able to be an additional support for Dashiell, including compensatory services." (PSUF ¶ 78).

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[22] Plaintiffs cited Mr. Hill's deposition testimony in addition to Mrs. Porter's declaration, but failed to provide the Court with the relevant portions of Mr. Hill's deposition.

On October 25, 2002, Mrs. Porter met with Honeycutt who provided her with a revised and condensed version of the goals and objectives, which reduced the number from six to twenty eight. (Id. ¶ 79).[24] On December 19, 2002, Thompson wrote to the Porters, stating that "Mrs. Honeycutt is prepared to provide Dashiell with four hours per week of compensatory services to be provided 3 p.m. to 5 p.m. on Tuesdays and Wednesdays through the end of the 2002-2003 school year. (Id. ¶ 80).[25]

(b) January 13, 2003 – The Porters Demand a Written Compensatory Education Plan Offer

Rather than accepting the District's December 19, 2002 proposal, the Porters responded in a January 13, 2003 letter, which made clear that they were no longer willing to discuss the topic of compensatory education in a piecemeal or ad hoc fashion at IEP meetings; demanding instead that all future communication on this topic be in writing. (Pl. Resp. to LD SGI ¶ 81; Pl. Exh. 80 at 00181).[26] Specifically, the Porter's letter asked the District to "document in writing its specific and comprehensive offer with regard to the compensatory education program or plan," as called for by the 1999 SEHO order and the 2001 CDE order, "including the total number of hours the district is offering, their frequency and duration, the period of time during which such compensatory education will be delivered and the overall plan for implementation . . . ." (Id. ¶ 81). The District did not respond to the letter ***in writing***; instead, the District attempted to discuss the topic at a March 2003 IEP meeting. The Porters declined to entertain the discussion.

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[23] SELPA stands for Special Education Local Plan Area.

[24] The District argues that the six goals were the same as the twenty-eight goals already agreed upon, but the text reveals modifications and omissions that clearly establish that they were not identical. (See LD SGI 79).

[25] To the extent that the District contends that the December 19, 2002 single page letter is a "written compensatory services plan," they do not demonstrate that it is sufficient to qualify as such.

[26] The Porters were requesting nothing more than what the law requires, a written offer from the District. See Union Sch. Dist. v. Smith, 15 F.3d 1519, 1526 (9th Cir. 1994).

(c) March 10, 2003 IEP Meeting

At the March 10, 2003 IEP meeting, Thompson attempted to revise the December 19, 2002 IEP offer by now offering three hours a week, instead of four hours a week, of compensatory education services and one hour a week of consultation with the parents. (PSUF ¶ 83). In addition, Ms. Honeycutt's modified goals and objectives were presented to the Porters for a second time. (Id. ¶ 84). The Porters refused to consent to these modified goals and objectives because they believed that they reflected a lower grade level of achievement, were less demanding, and required less educational progress than the twenty-eight goals previously agreed upon. (Id.).

(d) More Requests for a Written Compensatory Plan

On March 17, 2003, counsel for the Porters wrote another letter to the District that repeated the request for a written compensatory services plan. (Id. ¶ 85). They received no response. On July 15, 2003, Mrs. Porter tried again. (Id. ¶ 88). To date, the Porters have received no written response from the District regarding concrete details, *i.e.*, the content, nature, and frequency of a compensatory plan. (Id. ¶ 86).

4. The 2003 -2004 School Year (Tenth Grade)

(a) The November 17, 2003 Hill Complaint Filed with the CDE

During the discovery phase of this lawsuit, Matthew Hill attended the November 12, 2003 deposition of Southwest SELPA Director Robert Farran. (Id. ¶ 95). Five days later, Mr. Hill filed a complaint with the CDE on behalf of Dashiell requesting that the CDE open a second investigation because Dashiell was not receiving the compensatory services ordered by the SEHO in 1999 and the CDE in 2001. (Id.). Mr. Hill's letter bears a strong similarity to Mrs. Porter's letter sent in

November 2, 2001 to the CDE. Although the CDE never responded to Mrs. Porter's complaints, it responded to Mr. Hill's letter by commencing a complaint investigation. (Id. ¶ 96).

(b) December 4, 2003 IEP Meeting

In the meantime, on December 4, 2003, an IEP meeting took place in which the District acknowledged that twenty-four of the twenty-eight goals and objectives agreed to at the October 2002 IEP meeting had not been fully achieved. (Id. ¶ 97). On January 6, 2004, the Porters submitted their signed signature page to the December 4, 2003 IEP, stating that they consented to the services, but also made clear that they did so without waiving their rights "as to the sufficiency or appropriateness" of the compensatory services, and "without waiving [their] rights in connection with the litigation presently ongoing in the District Court." (Id. ¶ 98).[27]

(c) The March 18, 2004 CDE Investigation and Orders

On November 21, 2003, in response to Mr. Hill's complaint, the CDE commenced a compliance investigation and on March 18, 2004, issued its Compliance Report (the "2004 Report"). (PSUF ¶ 99).

(i) The 2004 Report's Findings

The Department of Education found that Dashiell had not received the compensatory education in accordance with the 1999 SEHO order or the CDE 2001 order. (Id. ¶ 99(a)). It also determined that Dashiell's current educational program was non-compliant with the IDEA because Dashiell had not been receiving the required compensatory services for a number of years and that the CDE bore "responsibility to ensure that this student receives the services to which he is entitled by law." (Id. ¶ 99(b); Pl. Exh. 198 at 00455). Although the CDE refused to render a ruling as to whether the District or the Porters were responsible for the lack of agreement and the resulting protracted non-compliance, the CDE ordered further corrective action to settle the issue because "the CDE has an obligation to ensure services to the student." (Id.).

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[27] Defendants once again attempt to argue that because of the Porter's reservation of rights, they did not consent to the IEP. (LD SGI ¶ 98). As discussed *infra*, this argument is frivolous.

(ii) The CDE's Corrective Action Orders

The CDE ordered the following corrective actions. (Pl. Exh. 198 at 00480). First, the CDE ordered Dashiell to be assessed at California's Diagnostic Center so that his present level of performance could be ascertained and an appropriate compensatory services plan could be implemented. The order obligated the District to provide evidence of Dashiell's referral, to prepare and deliver a referral packet with all the documentation necessary to the Center by April 4, 2004, and to forward the completed assessment to the CDE investigator by June 1, 2004. (Id. at 00480-81). The Porters were requested to sign the assessment, prepare and provide the Center with their own referral packet, visit with the Center, and make themselves and Dashiell available to the Center for his assessment by either April 19, 2004 or May 3, 2004. (Id.).

Second, the District was ordered, within ten days of the issuance of the Diagnostic Center's assessment report, but no later than July 15, 2004, to submit to the CDE investigator a written comprehensive compensatory services plan consistent with the Center's recommendations, containing all of the elements the Porters had requested the District address in their January 13, 2003, March 17, 2003, and July 15, 2003 letters. (Id. at 00482).

Third, the CDE ordered "the staff responsible for providing the compensatory services to keep logs/records specifically indicating the dates/time that the compensatory services were delivered." (Id.). The CDE required the logs/records to "clearly differentiate the compensatory services from the on-going IEP services." (Id.). The logs/reports were ordered to be sent to the CDE each month. (Id.).

The Porters were invited, within ten days of the issuance of the Center's assessment, to submit to the CDE investigator their recommendation for a reasonable comprehensive compensatory plan consistent with the assessment. (Id.). Upon receipt of the parties' respective plans, the CDE would appoint a panel to review the proposals. (Id. at 00483). The panel would consist of an autism specialist, a speech and language specialist, an educational inclusion specialist, a former resources specialist, and a CDE investigator. (Id.). The panel would then recommend a compensatory services plan. (Id.). After that recommendation was issued, further corrective actions would then be implemented. (Id.).

The CDE's order permitted the Porters to contest the assessment made by the Diagnostic Center. (Id.). If they disagreed with the assessment, the CDE would enlist its panel to formulate, establish, and order the implementation of a compensatory services plan with the information known "at the present." (Id. at 00483-84).

The 2004 Report did not make an explicit finding regarding whether the District implemented the after-school remedial reading instruction or the compensatory DIS counseling services in accordance with the agreed upon IEPs. (PSUF ¶¶ 249, 250). The 2004 Report did, however, generally note that Dashiell's current education program was noncompliant. (SD SGI ¶¶ 249-250).

(d) The CDE's Compensatory Education "Plan"

On July 20, 2004, the State Defendants amended the 2004 Compliance Report and issued a "compensatory special education plan" for Dashiell which summarized the conclusions reached in Dashiell's assessment as follows. (SD SGI ¶ 255; Johnson Decl. Exh. C. Comprehensive Services Plan at 2; Pl. Exh. 287). His capabilities, since elementary school, show that his intellectual capacity is below average. (Id.). His full scale I.Q. scores range from 63-81 with 100 being average. (Id.). His teachers have assessed his work between the second and sixth grade level, but as noted above, Dashiell has been advanced each year and is currently in the tenth grade. (Id.). Dashiell demonstrates difficulty with understanding abstract concepts so he struggles with drawing conclusions from what he reads and with reading comprehension generally. (Id.). He also has difficulty in math. (Id.). Dashiell has also not developed typical adolescent friendships. (Id.). He is often alone at lunchtime and is observed as "outside the group" in informal social situations. (Id.).

Given Dashiell's assessment, the CDE concluded that, had Dashiell received all of the required compensatory education services, he would have been further ahead academically, but only to a limited extent because the CDE concluded that Dashiell is currently working close to his potential academically and therefore any loss of educational benefit has been minimal. (Id.). It is difficult to square the conclusion with other findings, however, as the CDE states that Dashiell's academic work is only between the second and sixth grade level, but he passed all his ninth and tenth grade classes and is on track to graduate in 2006. (Id.).

The CDE's conclusions with regard to Dashiell's social progress was more critical of the District. (Id.). The CDE concluded that Dashiell would be further ahead socially and his language skills and comprehension skills would be better developed if the compensatory education services had been provided. (Id.). He would have benefitted from strategies that promote more peer-to-peer interactions, such as role play, structured cooperative learning, and additional structured social interchange in areas of interest such as sports, music, and drama. (Id.).

Overall, the CDE concluded that Dashiell was not provided his compensatory special education services because "the District has lacked the experience and a framework to deliver the most effective services to him and has not employed teaching strategies that have proven effective with students with autism spectrum disorders." (Id. at 2). As discussed *infra*, incompetence is not an excuse under the IDEA.

III.

DEFENDANTS HAVE NOT ESTABLISHED A GENUINE ISSUE OF MATERIAL FACT FOR TRIAL

A. The Rule 56 Standard

Under the Federal Rules of Civil Procedure, summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). Thus, when addressing a motion for summary judgment, this Court must decide whether there exist "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Facts are "material" if they must be decided to resolve a claim or defense to which the motion is directed. See id. at 248. An issue is genuine if there is evidence produced that would allow a reasonable jury to reach a verdict in favor of the non-moving party. Id.

The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. Id. at 256. A party opposing a properly made and supported motion for summary judgment may not rest upon mere denials but "must set forth specific facts showing that there is a genuine issue for trial." Id.; FED. R. CIV. P. 56(e). In particular, when the non-moving party bears the burden of proving an element essential to its case, that party must make a showing sufficient to establish a genuine issue of material fact with respect to the existence of that element or be subject to summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The court must assume the truth of direct evidence set forth by the opposing party. See Hanon v. Dataproducts Corp., 976 F.2d 497, 507 (9th Cir. 1992). But where circumstantial evidence is presented, the court may consider the plausibility and reasonableness of inferences arising therefrom. See Anderson, 477 U.S. at 249-50; TW Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626. 631-32 (9th Cir. 1987). In that regard,"[a] mere 'scintilla' of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving party must introduce some significant probative evidence tending to support the claim.'" Summers v. Teichert & Son, Inc., 127 F.3d 1150, 1152 (9th Cir. 1997) (quoting Anderson, 477

U.S. at 252); Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288 (9th Cir. 1987) (summary judgment may be granted if "the evidence is merely colorable . . . or is not significantly probative").

In ruling on a summary judgment motion, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249. Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions. Id. at 255.

B. The Defendants' Attempt to Create Fact Issues For Trial

Plaintiffs' statement of undisputed facts is well over 100 paragraphs long. For many of these facts, the Local Defendants, claim that they are disputed but cite to evidence that does not even colorably support their assertion. Indeed, the Court concludes that not a single "disputed" fact is in reality disputed.

1. The District's "Disputes" Regarding the Content of the SEHO Order

In the vast majority of instances, the evidence the District cites to support its purported dispute either has nothing whatsoever to do with the fact at issue, or actually supports the fact it purports to dispute. Indeed, each and every purported dispute with regard to Plaintiffs' facts citing to the holdings of the 1999 SEHO order fall into this category. For example, PSUF ¶ 12 states that during the summer of 1997, the District failed to place Dashiell in the least restrictive environment, which may have negatively impacted his social development. (Pl. SUF ¶ 12 (citing SEHO Order attached as Pl. Exh. 1 at 00019)). This factual statement is virtually a direct quote from the SEHO order. Nevertheless, the Local Defendants "deny that this fact is undisputed" and, as evidence, cite a portion of the 1999 SEHO order finding that Dashiell was not denied a FAPE from October 1998 to the end of the 1998-1999 school year. (See LD SGI ¶ 12). The finding that the District did not deny Dashiell a FAPE during a portion of the 1998-1999 school year has no bearing whatsoever on the fact that the SEHO concluded that Dashiell was denied a FAPE during the

Summer of 1997. Plaintiffs discuss and refute each and every such instance of this type of "dispute", forty-two in all, in their "supplemental statement of uncontroverted facts.

2. Inadmissible Evidence Cannot Create a Genuine Material Issue

In other instances, the evidence proffered by the Local Defendants is not supported by affidavits, deposition transcript testimony, interrogatory responses, or any other admissible evidence. For example, the Local Defendants assert that there is a dispute as to PSUF ¶ 29, which states:

> On 2/7/00, Mrs. Grandinette told Mrs. Porter that the District "had a teacher" to provide Dashiell with the After-School Tutoring. Ms. Grandinette further informed Mrs. Porter that the teacher was employed by the District and has a special education credential. Ms. Grandinette told Mrs. Porter that she would be in touch with her. Mrs. Porter received no further information.

As evidence of this fact, the Porters cite to Mrs. Porter's declaration and deposition testimony. The District disputes PSUF ¶ 29 by citing a letter from Andrew Arczynski, counsel for the Local Defendants, in which he states that "Mrs. Porter never accepted the offer for the home teacher" made by Mrs. Grandinette. The declarant provides no foundation for the assertion, and since he was not a party to the conversations, it is necessarily based on statements that Mrs. Grandinette, or others, made to him. As the statement is only relevant if true, its offer for its truth must be rejected because it is hearsay, and perhaps multiple hearsay. Accordingly, it cannot be used to create a genuine issue of fact for trial.

Similarly, the Local Defendants attempt to dispute PSUF ¶ 44(a)-(f), which set forth the CDE's findings in the 2001 Report, by pointing to several exhibits that purportedly show that the District convened twenty-two IEP meetings from 1997 to the